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IN THE

Supreme Court of the United States

October Term, 1960.

No. 934

WALTER L. and HELEN MORGAN,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Walter L. and Helen Morgan pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in *Commissioner of Internal Revenue v. Walter L. and Helen Morgan* on March 21, 1961.

OPINIONS BELOW.

The findings of fact and opinion of the Tax Court of the United States, reported at 33 T. C. 30, are printed in Appendix B, *infra* page 23. The opinion of the Court of Appeals reversing and remanding the decision of the Tax Court for further proceedings not inconsistent with its opinion is printed in Appendix C, *infra* page 41, and is reported unofficially at 61-1 USTC 9317 and 7 AFTR 2d 909. The dissenting opinion of Judge Hastie is printed in Appendix C, *infra* page 49.

JURISDICTION.

The judgment of the Court of Appeals, printed in Appendix D, *infra* page 54, was entered on March 21, 1961. A Petition for Rehearing, timely filed on April 5, 1961, was denied on April 13, 1961. The order denying the Petition for Rehearing and signed by the same panel entering the judgment is printed in Appendix E, *infra* page 55.

Petitioners invoke the jurisdiction of this Court under Section 1254(1) of the Judicial Code, 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

1. Section 112(c)(2) of the Internal Revenue Code of 1939 by explicit statutory provision is made applicable only to corporate reorganization transactions involving "exchanges" of so-called "like-kind" property. Assuming *arguendo* a corporate reorganization, the question presented is whether the Court of Appeals for the Third Circuit erred in holding that *even without any demonstrable* "exchange" of like-kind property Section 112(c)(2) is nevertheless applicable if the given business objective of the reorganization can be accomplished with or without an exchange.

2. May the Court of Appeals properly find the existence of a reorganization under Section 112(g) of the Internal Revenue Code of 1939 where the Trial Court specifically refrained from making such finding?

STATUTES AND REGULATIONS INVOLVED.

Statutory provisions involved are Sections 112(b)(3), 112(c)(1), 112(c)(2) and 112(g)(1)(D) and Section 115(c) of the Internal Revenue Code of 1939, 26 U. S. C. Sections 112(b)(3), 112(c)(1), 112(c)(2), 112(g)(1)(D) and 115(c). They are printed in Appendix A, *infra* page 19.

STATEMENT OF THE CASE.

A. The Nature of the Proceeding.

This case involves the federal income tax liability of the Petitioners for the calendar year 1952.

During the calendar year 1952, Walter L. Morgan (hereinafter sometimes referred to as "Petitioner") received a distribution in complete liquidation of Wellington Corporation, which distribution he reported as long-term capital gain under Section 115(c) of the Internal Revenue Code of 1939 on his federal income tax return for that year filed jointly with his wife, Helen Morgan. The Commissioner of Internal Revenue proposed a deficiency in tax on the ground that the said distribution was made pursuant to a plan of reorganization as defined in Section 112(g)(1)(D) and taxable as a dividend under Section 112(c)(2). Pursuant to Section 272 of the Internal Revenue Code of 1939 Petitioners filed a Petition in the Tax Court of the United States for a redetermination of the proposed deficiency, and the Tax Court entered judgment for the Petitioners. On Appeal by the Commissioner of Internal Revenue, the Court of Appeals in a two to one decision, reversed and remanded the decision of the Tax Court.

The sole issue is whether the Court of Appeals erred in holding that Section 112(c)(2) of the Internal Revenue Code of 1939 applied to the liquidation distribution received by Petitioner during the calendar year 1952. The decision of this issue turns upon two basic questions: (1) assuming *arguendo* a corporate reorganization, whether Sections 112(b)(3) and 112(c)(2) (the so-called "nonrecognition" and "boot" provisions applicable to exchanges in pursuance of plans of corporate reorganizations) apply to a distribution in complete liquidation of a corporation in a situation where, concededly, the distributee-shareholder does not, either directly or indirectly, actually or constructively,

receive stock in any corporation, party to a plan of reorganization, and (2) whether under the facts of record, the distribution received by taxpayer in 1952 was made pursuant to a plan of reorganization within the meaning of Section 112(g)(1)(D) of the Internal Revenue Code of 1939.

B. The Facts.

The facts of this case, fully stated in the opinion of the Tax Court (Appendix B, *infra* p. 23), may be summarized as follows:

Wellington Corporation (hereinafter referred to as "Corporation"), from its organization in 1929 until 1952, the year involved in this case, served as investment advisor for Wellington Fund, Inc. (hereinafter referred to as "Fund"), a balanced mutual fund [i.e., an open-end investment company]. In 1952, Fund, in conformity with a trend in the industry and in order to achieve certain economies of operation and competitive advantages decided to use a single company for its investment advisory and underwriting services. As a result Fund cancelled its contract with Corporation, and entered into a new investment advisory contract with W. L. Morgan & Company, which was performing underwriting services for Fund. W. L. Morgan & Company subsequently changed its name to Wellington Company (hereinafter referred to as "Company"). Company was organized in 1931 and had acted as underwriter for Fund ever since. This action of Fund was approved by its board of directors and its shareholders. A majority of the board of directors of Fund, during all times relevant hereto, was independent of taxpayer, who owned all the stock of both Corporation and Company, as required by the Investment Company Act of 1940 and the regulations of the Securities and Exchange Commission. Taxpayer and persons related to taxpayer owned only an insignificant fraction of the shares of Fund and had no control over Fund. Nothing was transferred by Corporation to Com-

pany except a small amount of office furniture which was sold at its fair market value for cash. No stock of Company was issued or exchanged at any time in connection with the transactions herein involved.[1] Corporation, after the loss of the investment advisory contract with Fund, which had been its principal source of business, attempted to secure additional business. However, after such attempts had failed to generate sufficient business to justify its continued existence, Corporation was liquidated. The amount received by taxpayer in excess of his basis for the stock was reported in taxpayer's 1952 Federal income tax return as an amount received in exchange for stock pursuant to complete liquidation under Section 115(c) subject to capital gains treatment. The Commissioner, on the other hand, maintained that the amount received by taxpayer in excess of his basis for the stock should be treated as a dividend under the "boot" provisions of Section 112(c)(2).

C. Decisions of the Courts Below.

On the foregoing facts, the Tax Court held that Section 112(c)(2) was not applicable for the reason that there was no exchange of stock or securities as is requisite under the express provisions of Section 112(b)(3) and 112(c)(1) before Section 112(c)(2) can operate. The Tax Court found that "*Petitioner received nothing* other than $211,150.99 in cash and bonds of the United States upon the liquidation" (Appendix B, *infra* p. 35) and that "here there were *no exchanges solely in kind* as enumerated in Sections 112(b)(1), (2), (3), or (5)." (Appendix B, *infra* p. 36.) (Emphasis supplied.) Thus finding that the "exchange" requirement for operation of Section 112(c)(2) was not established, the Tax Court entered judgment in favor of the Petitioners and found it unnecessary to make a finding whether the liquidation distribution was in pursuance of a

1. The only capital stock or securities of Company received by taxpayer at any time was at the time of incorporation over twenty years earlier.

plan of reorganization within Section 112(g)(1)(D) of the Code.

Over the dissent of Judge Hastie, the Court of Appeals reversed, holding that Section 112(c)(2) was operable even though there was no exchange of stock. In so holding the majority recognized that Section 112(c)(2), by express reference to Sections 112(b)(3) and 112(c)(1), expressly called for an exchange of stock before the section could become applicable. But the majority held nevertheless that Section 112(c)(2) was applicable. In what appears to be the heart of the opinion, Judge Staley, with Judge Kalodner concurring, said (Appendix C, *infra* p. 48):

> "Here the issuance of new stock [i.e., the exchange] would have been a meaningless gesture since the stock the taxpayer already held represented the total value of all the assets except for the boot."

The majority also found that the transactions involving Corporation, Company and Petitioner constituted the carrying out of a plan of reorganization under Section 112(g)(1)(D).

As noted, Judge Hastie dissented, saying, and we submit properly so (Appendix C, *infra* pp. 49-50):

> "[T]he plain language of the statute requires that there be an exchange of stock. *Trianon Hotel Co.*, 1958, 30 T. C. 156; *Emma Cramer*, 1953, 20 T. C. 679; 3 MERTENS, FEDERAL INCOME TAXATION, 1957 § 20.147.
>
> . . . It is argued, however, that in this case no transfer of stock of a corporation to the taxpayer is the legal equivalent of an actual stock transfer merely because the taxpayer already was and long had been sole stockholder of that corporation. I can see no logical basis for thus finding an exchange of stock within the statutory requirement without any demonstration that something happened in this case which was equivalent to a transfer of stock to the taxpayer."

Judge Hastie continued (Appendix C, *infra* pp. 52-53):

> "In these circumstances, I do not see how it can be said in any meaningful way that there was in this case even a conceptual exchange of stock, and, of course, there was not a real one."

D. Petitioners' Position.

It is Petitioners' position that as presently enacted, the provisions of Section 112(c)(2) cannot become operable unless a taxpayer engages in a transaction involving at least a conceptual exchange of stock. This is an express requirement of the Code which cannot be written out of the statute by judicial action. There is no court decision supporting the decision of the Court of Appeals herein based on its majority opinion. To the contrary, as will be fully pointed out hereinafter, the decision of the Court of Appeals herein based on the majority opinion is in direct conflict with the only other court decisions directly in point. Moreover, and more significant, the position of the majority herein is directly contrary to the opinion of a Congressional Advisory Group which has studied the matter and is also contrary to the expressed opinion of all informed practitioners and tax authorities who have had occasion to consider the subject.

With respect to the second question, it is Petitioners' position that it was for the Tax Court in the first instance and not the Court of Appeals to determine the existence of a reorganization, and thus at most the province of the Court of Appeals was to remand the case to the Tax Court for a determination as to the existence of a reorganization.

REASONS FOR GRANTING THE WRIT.

I. The Court of Appeals, by Clear-cut Judicial Legislation, Has So Far Departed From the Accepted and Usual Course of Judicial Procedures as to Call for an Exercise of This Court's Power of Supervision.

In respect of question no. 1 herein, the sole issue before the Court of Appeals was whether Section 112(c)(2) of the Internal Revenue Code (the so-called "boot" provision complementing the tax-free provisions covering exchange of like-kind properties) was applicable to the factual situation of this case in which the trial court had flatly found that, assuming *arguendo* a corporate reorganization, the reorganization transaction did not involve an "exchange" of like-kind property.

The decision of the Court of Appeals, based on the majority opinion, even after expressly recognizing that Section 112(c)(2) requires such an exchange before it becomes operable, holds nevertheless that Section 112(c)(2) was applicable upon the facts of this case merely because in the majority's opinion the same given business objective of the reorganization transaction could have been obtained with or without an exchange. In the words of the majority, in view of the fact that the Petitioner owned all the capital stock in both corporations party to the transaction, an exchange of stock under the circumstances would have been a meaningless gesture. Thus, in a word, the majority *struck* the term "exchange" from the statute and rendered meaningless the words "not only of" [like-kind property] "but also of" [boot].

Congress is entirely familiar with the fact that Section 112(c)(2) applies only in the case of an "exchange" of like-kind property, but as yet has taken no action to enlarge the scope of the statutory provision. Section 21 of H. R. 4459, introduced by Chairman Wilbur B. Mills of the Committee on Ways and Means on February 12, 1959 and directly responsive to reports of the Advisory Group here-

after referred to, did not get out of Committee. The decision based on the majority opinion is a clear-cut case of judicial legislation amending a statute which Congress has not seen fit to amend although fully advised in the premises. As Judge Hastie said of Section 112(c)(2) in concluding his opinion in a footnote:

> "If this discloses a 'loophole' in the statutory taxing scheme which should be closed, resort should be to Congress for appropriate action."

The Advisory Group [2] on Subchapter C of the Internal Revenue Code of 1954 in its Report on Corporate Distributions and Adjustments to Accompany Subchapter C Advisory Group Proposed Amendments which was transmitted to the House Committee on Ways and Means in 1957 [3] and 1958 [4] *conceded the fact that an actual "exchange" was necessary* before the "boot" provisions of the Code can come into play. The Advisory Group, recommending amendatory legislation with respect to Section 356(a)(2) of the 1954 Code, the current counterpart of Section 112 (c)(2) of the 1939 Code, stated (p. 54):

> "*Boot received in 368(a)(1)(D) reorganizations.—In Section 356(a) of the existing law the boot provisions literally operate only where stock or securities are exchanged for stock or securities.* In a 368(a)(1)(D) reorganization, cases have arisen in which one controlled corporation immediately prior to its complete liquidation transfers property gratuitously to another corporation controlled by the same shareholders without receiving back any stock or securi-

2. The members of the Advisory Group appointed by Chairman Mills included some of the foremost authorities on Subchapter C and all are recognized leaders of the Tax Bar, selected because of their contributions to the development of the law.

3. United States Government Printing Office, Document No. 99187 (1957).

4. Subchapter C Advisory Group's Revised Report, dated December 11, 1958, U. S. G. P. O., Document No. 33006 (1958).

ties of the transferee. Moreover, in the area of so-called reincorporations, a corporation may be completely liquidated and part of the assets received by the shareholders may be transferred by them as a contribution to capital of another controlled corporation. *In the suggested revision, the language of section 356(a)(2)(B)(ii) would bring these transactions within the boot rule even though no stock or securities are received from the transferee corporation.*" (Emphasis supplied.)

The views of the Congressional Advisory Group are squarely in accord with a trio of decisions of the Tax Court of the United States, culminating in its decision in the instant case. The others are *Emma Cramer*, 20 T. C. 679 (1953); *Trianon Hotel Co.*, 30 T. C. 156 (1958). Oddly inconsistent with the Commissioner's position in this case, the Commissioner acquiesced in the Tax Court's decisions in *Cramer* and *Trianon*. See 1960-1 C. B. 4 and 1959-1 C. B. 5. Furthermore, all tax authorities, commenting on the application of the boot provisions, uniformly agree with the view of the congressional committee and the Tax Court.[5]

In sum, this action by the Court of Appeals, overtly striking the term "exchange" from the statute, constitutes a clear-cut case of judicial legislation. The court manifestly exceeded its province, and in so doing so departed from the established course of judicial procedure as to call for this Court to exercise its supervisory powers and reverse the decision of the Court of Appeals based on the majority decision.

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5. MERTENS, FEDERAL INCOME TAXATION § 20.147 (1957); Greene, *Proposed Definitional Changes in Reorganizations*, 14 Tax Law Review 155, 190 (1959); see also MacLean, *Problems of Reincorporation and Related Proposals of the Subchapter C Advisory Group*, 13 Tax Law Review 407, 412-13 (1958).

II. The Decision of the Court of Appeals, Based on the Majority Decision, Is From the Viewpoint of Construction of Laws in Direct Conflict With Applicable Decisions of This Court.

It is, as heretofore indicated, the position of the Petitioners in respect of question no. 1 herein that the decision of the Court of Appeals, based on the majority opinion, is a clear-cut case of judicial legislation, calling for supervision and reversal by this Court. If, however, it be argued that the majority opinion below is no more than interpretation of the scope of the term "exchange", i.e., a matter of construction of the laws, then the decision of the Court of Appeals calls nevertheless for review by this Court. As a matter of statutory interpretation, the majority opinion falls directly into conflict with the applicable and long-standing rule as established by this Court. In *Gould v. Gould*, 245 U. S. 151, 153 (1917), this Court said:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out."

And in *DeGanay v. Lederer*, 250 U. S. 376, 381 (1919), this Court, in affirming a question certified by the Court of Appeals for the Third Circuit, the Court of Appeals here involved, said:

> "Unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense, and with the meaning commonly attributable to them."

Those basic tenets of statutory construction have been confirmed and reaffirmed over the years. In 1956 this Court said again:

> "The words of the statute . . . are to be taken in the sense in which they will be understood by that

> public in which they are to take effect." *United States v. Leslie Salt Co.*, 350 U. S. 383, 397 (1956) quoting with approval from *United States v. Isham*, 17 Wall. 496, 504 (1873).

A transfer not involving an exchange does not meet the statutory condition of Section 112(c). This is not a case involving a step transaction. This is not a case involving a sham transaction. Compare *Gregory v. Helvering*, 293 U. S. 465 (1935) and *Knetsch v. United States*, 364 U. S. 361 (1960). The Court of Appeals did not look through form to find, in substance, an exchange. The Court simply held that since the taxpayer could have accomplished his economic desire with or without an exchange the taxpayer could not avoid the tax which would have been payable *if* he had made an exchange. But that line of reasoning is directly in conflict with the well established principle, as stated by this Court:

> "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted. . . ." *Gregory v. Helvering*, 293 U. S. 465, 469 (1935); *Knetsch v. United States*, 364 U. S. 361 (1960).

The provisions of Section 112(c) are clear and unambiguous, and the Court of Appeals has given the statute a construction which embraces matters far beyond the scope of the normal, ordinary and usual meaning of its words.

If because of the clear language of the statute it be deemed *arguendo* that the court below did make a finding that there was an exchange then, in view of the findings of the Tax Court based upon the undisputed evidence that there was no exchange, the Court violates the rule[6] that findings of fact of the trial court shall not be set aside unless clearly erroneous. In the words of this Court recently stated:

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6. Fed. R. Civ. P. 52(a).

"Where the trial has been by a judge without a jury, the judge's findings must stand unless 'clearly erroneous.'" *Commissioner v. Duberstein*, 363 U. S. 278, 291 (1960).

It is apparent that the decision of the Court of Appeals based on the majority's decision is in conflict with the applicable decisions of this Court, and for this reason we respectfully urge the Court to issue the Writ of Certiorari here sought.

III. The Decision of the Court of Appeals, Based on the Majority Decision, Presents an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

The decision of the Court of Appeals based on the majority opinion holds that a provision of the federal income tax law, Section 112(c) of the Internal Revenue Code of 1939, which, concededly, is expressly made applicable by Congress only to "exchange" of like-kind property is in fact applicable in cases not involving such exchanges. The decision totally alters the heretofore generally accepted understanding of the application of the "boot" provision complementing transactions in pursuance of corporate reorganizations, and for this reason alone assumes a substantial importance. The position of the Commissioner of Internal Revenue in this case, now approved by the majority opinion in its reversal of the Tax Court, is totally inconsistent with the Commissioner's own position in his acquiescence in other decisions of the Tax Court in *Emma Cramer*, 20 T. C. 679 (1953) *acq.* 1960-1 C. B. 4 and *Trianon Hotel Co.*, 30 T. C. 156 (1958), *acq.* 1959-1 C. B. 5. The precise question involved has not been considered by this Court, and it is respectfully urged for the guidance of taxpayers and Treasury alike that the question be settled by this Court.

Of perhaps even more significant import, the decision of the Court of Appeals based on the majority opinion stands as precedent for the theory that apparently explicit conditions and terms of a statute are not necessarily conditions and terms at all. Against the background of current appeal for simplicity of the tax laws, the decision appears unbelievably incongruous, and the drastic effect on our tax laws is obvious. As this Court itself has noted:

> "To make the taxability of the transaction depend upon the determination whether there existed an alternative form which the statute did not tax would create burden and uncertainty." *Founders General Corp. v. Hoey*, 300 U. S. 268, 275 (1937).

If our present self-assessment tax system is dangerously burdened by technical exceptions and so-called preferences and loopholes, what will be the resultant effect if taxpayers are also told that they must comply with a judicial gloss which eliminates express conditions and terms of the statute.

The law urgently requires consideration by this Court. We respectfully urge the Court to issue the Writ of Certiorari here sought.

IV. The Action of the Court of Appeals in Finding the Existence of a "Reorganization", a Finding Which the Trial Court Specifically Refrained From Making, Directly Violates the Applicable Mandate of This Court That Such a Finding Is for the Trial Court.

In respect of question no. 2 herein, the majority opinion finds the existence of a "reorganization", a finding which the Tax Court specifically refrained from making, and based its finding on purported evidence nowhere found in the record.

In the *United States v. Cumberland Public Service Co.*, 338 U. S. 451, 456 (1950), this Court after discussion of the

oddities in tax consequences which emerge from the present taxing scheme depending upon the form in which a taxable transaction is presented, said:

> "It is for the trial court, upon consideration of an entire transaction, to determine the factual category in which a particular transaction belongs."

This Court in *Helvering v. Rankin*, 295 U. S. 123, 131 (1935) stated:

> "If the Board has failed to make an essential finding and the record on review is insufficient to provide the basis for a final determination, the proper procedure is to remand the case for further proceedings before the Board. Compare Helvering v. Taylor, 293 U. S. 507; Murphy Oil Co. v. Burnet, 287 U. S. 299, 308. *And the same procedure is appropriate even when the findings omitted by the Board might be supplied from examination of the record.*" (Emphasis supplied.)

The majority of the Court of Appeals in this case bolsters its opinion by referring to "facts" that do not appear in the record, for example: the majority opinion quotes taxpayer (Appendix C, *infra* p. 46) as stating "that transferor could perform no investment advisory services without the use of the transferee's personnel." A diligent search of the record fails to uncover any such testimony by taxpayer.

Again, the majority states (Appendix C, *infra* p. 44): "At the Fund's board meeting, held February 27, 1952, taxpayer raised the question of *transferring the contract from transferor to transferee.*" The majority statement is an unwarranted assumption of facts not supported by the record.

And, the majority seems to hint at some sort of domination of the Board of Fund by the taxpayer, although there is no finding of such domination below. The ma-

jority devotes a full paragraph to working out personal and business relationships with the taxpayer, many of them long past. Obviously, members of Boards of Directors are not ordinarily strangers, and it is not for an appellate court to draw conclusions of domination which the lower court in its capacity of fact-finder did not draw.

The several courts of appeals have also applied the rule; indeed it was clearly and recently expressed by Judge Kalodner (who concurred in the majority opinion in this case) in a 1952 decision of the Court of Appeals below:

> "[T]he appellate function is limited to examination of the record to ascertain whether there is sufficient evidence to sustain whatever may be the finding of the Court below." *McCord v. Granger,* 201 F. 2d 103, 105-06 (3rd Cir. 1952).

Upon the basis of the rulings of this Court, as supplemented by rulings of the Court of Appeals, taxpayer submits that if it is material to the determination of this case whether in fact the transaction involving Petitioner, Corporation and Company constituted a reorganization within the meaning of Section 112(g)(1)(D), then it is for the Tax Court and not the Court of Appeals to first make that finding. The proper function of the Court of Appeals at this juncture was that of remand.

Accordingly, if this Court for any reason should not issue the Writ of Certiorari here sought for any of the foregoing reasons, it is respectfully urged that this Court issue the Writ of Certiorari in the interest of justice to the taxpayer, and order that this case be remanded to the Tax Court for the purpose of its making a finding as to the existence or nonexistence of a reorganization.

CONCLUSION.

For the foregoing reasons it is submitted that the petition for Writ of Certiorari should be granted.

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APPENDIX A.

INTERNAL REVENUE CODE OF 1939.

Section 112. Recognition of Gain or Loss.

(a) *General Rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, . . . shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges Solely in Kind.*

(1) *Property Held for Productive Use or Investment.*—No gain or loss shall be recognized if property held for productive use in trade or business or for investment (not including stock in trade or other property held primarily for sale, nor stocks, bonds, notes, choses in action, certificates of trust or beneficial interest, or other securities or evidences of indebtedness or interest) is exchanged solely for property of a like kind to be held either for productive use in trade or business or for investment.

(2) *Stock for Stock of Same Corporation.*—No gain or loss shall be recognized if common stock in a corporation is exchanged solely for common stock in the same corporation, or if preferred stock in a corporation is exchanged solely for preferred stock in the same corporation.

(3) *Stock for Stock on Reorganization.*—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock of securities in such corporation or in another corporation a party to the reorganization.

• • •

(5) *Transfers to Corporation Controlled by Transferor.*—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; . . .

• • •

(c) *Gain From Exchanges Not Solely in Kind.*

(1) If an exchange would be within the provisions of subsection (b)(1), (2), (3), or (5) or within the provisions of subsection (1), of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph or by subsection (1) to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

(2) If a distribution made in pursuance of a plan of reorganization is within the provisions of paragraph (1) of this subsection but has the effect of the distribution of a taxable dividend, then there shall be taxed as a dividend to each distributee such an amount of the gain recognized under paragraph (1) as is not in excess of his ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913. The remainder, if any, of the gain recognized under paragraph (1) shall be taxed as a gain from the exchange of property.

• • •

(g) *Definition of Reorganization.*—As used in this section

(1) The term "reorganization" means (A) a statutory merger or consolidation, or (B) the acquisition by

one corporation, in exchange solely for all or a part of its voting stock, of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of another corporation, or (C) the acquisition by one corporation, in exchange solely for all or a part of its voting stock, of substantially all the properties of another corporation, but in determining whether the exchange is solely for voting stock the assumption by the acquiring corporation of a liability of the other, or the fact that property acquired is subject to a liability, shall be disregarded, or (D) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its shareholders or both are in control of the corporation to which the assets are transferred, or (E) a recapitalization, or (F) a mere change in identity, form, or place of organization, however effected.

(h) *Definition of Control.*—As used in this section the term "control" means the ownership of stock possessing at least 80 per centum of the total combined voting power of all classes of stock entitled to vote and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

• • •

Section 115. Distributions by Corporations.

(c) *Distributions in Liquidation.*—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. In the case of amounts distributed (whether before January 1, 1939,

or on or after such date) in partial liquidation (other than a distribution to which the provisions of subsection (h) of this section are applicable) the part of such distribution which is properly chargeable to capital account shall not be considered a distribution of earnings or profits. If any distribution in partial liquidation or in complete liquidation (including any one of a series of distributions made by the corporation in complete cancellation or redemption of all its stock) is made by a foreign corporation which with respect to any taxable year beginning on or before, and ending after, August 26, 1937, was a foreign personal holding company, and with respect to which a United States group (as defined in section 331(a)(2)) existed after August 26, 1937, and before January 1, 1938, then, despite the foregoing provisions of this subsection, the gain recognized resulting from such distribution shall be considered as a gain from the sale or exchange of a capital asset held for not more than 6 months.

APPENDIX B.

TAX COURT OF THE UNITED STATES.

(Caption omitted.)

FINDINGS OF FACT AND OPINION.

Respondent determined a deficiency in petitioners' income tax for the year 1952 in the amount of $168,442.85. Respondent has conceded that one adjustment was erroneously made. The two issues now before us arise out of the determination by the respondent as to the nature of certain corporate distributions, explained in the statutory notice as follows:

> (a) Distributions to you by the following corporations as purported liquidating dividends are held to be essentially equivalent to the distribution of taxable dividends, taxable as ordinary income rather than as long-term capital gains:
>
> | *Distributing Corporation* | *Return in Excess of Bases Taxable as a Dividend* |
> |---|---|
> | Wellington Corporation | $212,150.99 |
> | Fund Shares, Inc. | 56,425.88 |

Petitioners contest both of the foregoing adjustments.

The issues here presented are: (1) Were distributions made by the Wellington Corporation to petitioner Walter L. Morgan during 1952 in the amount of 214,150.99 in complete liquidation of his stock therein, $212,150.99 of which was in excess of the cost basis of his stock, taxable to petitioner as capital gain under the provisions of section 115(c), 1939 Code, as petitioner contends, or did the $212,150.99 in

question represent distributions to petitioner essentially equivalent to dividends under section 112(c)(2), as the Commissioner contends. (2) Were distributions made by Fund Shares, Inc., to the petitioners during 1952 in complete liquidation of their stock therein, taxable to them as capital gains to the extent that the amounts received exceeded the cost basis of their stock, as petitioners contend, or was the $56,425.88 in question taxable to petitioners as dividends under section 115(g)(1), as the Commissioner contends.

GENERAL FINDINGS OF FACT.[1]

A stipulation of facts has been filed and is incorporated herein by reference.

Petitioners are individuals who were, during the calendar year 1952 and continue to be, husband and wife residing at Bryn Mawr, Pennsylvania. Hereinafter Walter L. Morgan is referred to as the petitioner.

Petitioners timely filed their joint income tax return for the calendar year 1952 with the district director of internal revenue, Philadelphia, Pennsylvania.

Wellington Fund, Inc., herein referred to as Fund, Inc., is a corporation organized in 1928 under the laws of the State of Delaware. Since its organization, Fund, Inc., has carried on the business of a balanced mutual fund in the form of an open end investment company.

The Wellington Corporation, herein referred to as the Corporation, was organized in 1929 under the laws of the State of Delaware. For approximately 20 years prior to April 12, 1952, the Corporation's principal business was providing investment advisory service to Fund, Inc.

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1 Facts common and relevant to both issues herein are found under this heading, "General Findings of Fact." Facts peculiar to each particular issue are found under the subheadings, "Issue I" and "Issue II."

W. L. Morgan & Co., herein referred to as the Company, was organized in 1931 under the laws of the State of Delaware. It has, since its organization, served as national sponsor or underwriter, promoter and distributor of the stock of Fund, Inc. On April 10, 1952, its name was changed to The Wellington Company, hereafter referred to as the Company, and since April 12, 1952, it has supplied investment advisory service to Fund, Inc., as well as continued to serve as national sponsor or underwriter, promoter and distributor of the stock of Fund, Inc.

Fund Shares, Inc., herein referred to as Shares, was organized in 1948 under the laws of the State of Delaware. Its principal business was the promotion and wholesale distribution of stock of Fund, Inc., in the West and mid West under a contract with the Wellington Company, formerly W. L. Morgan & Co.

At all times relevant herein, petitioner owned 100 per cent of the outstanding stock in the Corporation and in the Company. Petitioner held 53.33 per cent of the stock of Shares and petitioner's wife (the co petitioner) held 45 per cent of the stock in Shares. Petitioner and members of his family held 13,500 shares of the approximately 10 million shares of outstanding stock of Fund, Inc.

At all times relevant petitioner was president and chairman of the board of directors of Fund, Inc., the Corporation, the Company, and Shares.

The board of directors of Fund, Inc., on December 31, 1951, and December 31, 1952, consisted of 11 members whose names, relationships to petitioner, and the periods or relevant times of the existence of the relationships are as follows:

Director	*Nature of Relationship*	*Period*
James S. Benn, Sr.	Father of Morgan's wife who died in 1941	(Not shown) to 1941
George B. Junkin	President of a company of which Morgan was treasurer	1928-1945 (approx.)
A. Moyer Kulp	Vice-Pres., the Fund	Feb. 27, 1952
	Vice-Pres. & Dir. of Investment Committee, the Company	Feb. 27, 1952
	Vice-Pres. & Exec. Dir. of Investment Committee, the Corporation	Feb. 27, 1952
Rawson Lloyd	Vice-Pres. & Secy., the Fund	Feb. 27, 1952
	Vice-Pres. & Dir. of Investment Research, the Company	Feb. 27, 1952
	Vice-Pres. & Dir. of Investment Research, the Corporation	Feb. 27, 1952
Nicholas S. Ludington	Owner of several companies of which Morgan was treasurer	1930
	Chairman of Board of real estate firm through which Morgan sometimes purchased properties	Prior to and on Feb. 27, 1952
Howard S. McClurken	Partner with Morgan in CPA firm	1926-1948
Wallace M. McCurdy	(No relationship shown)	
Walter M. Morgan	Petitioner—Chairman of Board	
R. Sanford Saltus	(No relationship shown)	
Joseph E. Welch	Exec. Vice-Pres. & Treas., the Fund	Feb. 27, 1952
	Secy. & Dir., the Company	Feb. 27, 1952
	Exec. Vice-Pres. & Secy., the Corporation	Feb. 27, 1952
Alvin J. Wilkins	Vice-Pres., the Fund	Feb. 27, 1952
	Sales Manager, W. L. Morgan & Co.	Feb. 27, 1952
	Vice-Pres. in charge of distribution, the Company	Feb. 27, 1952

The total stockholdings in Fund, Inc., of all of the directors of Fund, Inc., and their families, petitioner excepted, were approximately 17,500 shares. The aggregate holdings of all of the directors and their families, petitioner and his family included, were approximately .003 per cent of the outstanding stock of Fund, Inc.

Section 10(a) of The Investment Companies Act of 1940,[2] which said act is administered by the Securities and Exchange Commission, requires that not more than 60 per cent of the board of directors of an investment company may be the investment advisors of such company, or affiliated persons of the investment advisor, or persons who are officers or employees of the investment company. Section 10b(2) of the same act[3] further provides that if the principal sales under underwriter of an investment company is either a director, officer or employee of the investment company of an affiliated person, the majority of the board of directors must be persons who are neither the principal sales underwriter nor affiliated persons of such principal sales underwriter.

For the purpose of meeting the requirements of The Investment Companies Act of 1940, *supra*, and regulations of the Securities and Exchange Commission promulgated pursuant thereto,[4] the following directors of Fund, Inc., were deemed independent directors:[5]

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2. Investment Companies Act of 1940, Act of Aug. 22, 1940, c. 686, Title I, Sec. 10, 54 Stat. 806.

3. *Ibid.*

4. 17 C. F. R. 210.6-01 to 210.6-10.

5. See also the following sections of The Investment Companies Act of 1940, *supra*, n. 1:

Sec. 2(a)(3), 54 Stat. 791, which defines "affiliated person."

Sec. 8(b)(3), 54 Stat. 804, which requires the filing with the Securities and Exchange Commission of the names of all affiliated persons, and of the names and business experience for the preceding 5 years of each officer and director of an investment company upon registration under the act.

Sec. 30(b)(1), 54 Stat. 836, which requires the filing of reports subsequent to registration, so as to keep the information submitted in the application for registration current.

James S. Benn, Sr.
George B. Junkin
Nicholas S. Ludington
Howard S. McClurken
Wallace M. McCurdy
R. Sanford Saltus

During the years 1943 to 1952 a pronounced trend toward single advisory-sales companies developed in the mutual investment fund industry. The reasons for this trend were:

1. Increased experience under Federal laws enacted in 1933[6] and 1934[7] to curb misrepresentation in the sale of stocks had decreased the fear of subjecting the income from performance of the advisory function to the possible liabilities arising from performance of the promotion and sales function. The application of these laws had become sufficiently predictable that during this period insurance against such liabilities became available.

2. Single advisory-sales companies enjoy two sources of income, one based on a percentage of the sales of stock, the other based upon a percentage of the value of the assets of the mutual fund. A decline in one type of income is not necessarily reflected in the other. This combination or stabilization of income permits the continuance, at a sustained level, of either function despite a short-term decline in its income, and the mutual fund so served is benefited by continuity of advisory personnel and sustained sales effort.

3. By combining and stabilizing the income of a single advisory sales company, its margin of profit can be re-

6. The Securities Act of 1933, Act of May 27, 1933, c. 38, Title I, 48 Stat. 74 *et seq.*, as amended; nota bene sections 12 and 24.

7. The Securities Exchange Act of 1934, Act of June 6, 1934, c. 404, 48 Stat. 881 *et seq.*, as amended; nota bene sections 9(a)(3), (4), and (5), 9(e), 18(a), and 32.

duced with a concomitant reduction in the per share management costs to the mutual fund. In the highly competitive mutual investment fund industry, low per share management costs are an incentive to continued shareholding and an inducement to new or increaased shareholding.

On February 27, 1952, the board of directors of Fund, Inc., unanimously approved an investment advisory agreement with the Company and submitted the agreement for the approval of the stockholders of Fund, Inc., at their annual meeting on April 9, 1952. The agreement was approved by a majority of the stockholders and was entered into by Fund, Inc., and the Company on April 12, 1952.

As a result of the combination and stabilization of income from the advisory and the sales functions through consolidation of the two functions in the Company, the Company was able to spend more money on sales promotion, expand sales operations into additional markets, decrease its concessions on, and thereby stimulate, large sales of stock, and establish an installment purchase plan.

Issue I.

Wellington Corporation.

For the fiscal year ended May 31, 1951, the Corporation reported income of $305,175.96. No dividends were paid during the fiscal year. During late 1951 and early 1952, an internal revenue agent assigned to examine the Corporation's income tax return discussed the imposition of a surtax upon the accumulated earnings with several representatives of the Corporation. As a result of these meetings, a preliminary formal conference between representatives of the Corporation and the Government was held on February 11, 1952. No agreement was reached.

At a meeting of the board of directors of the Corporation held on March 3, 1952, it was determined that a study of the prospects of obtaining new business to replace the

loss of the advisory contract with Fund, Inc., should be made to determine whether the Corporation should continue in business or liquidate. Subsequent to that meeting, several advisory accounts were obtained and petitioner and other officers and directors of the Corporation investigated its business prospects. On May 27, 1952, the board of directors of the Corporation upon written consent of petitioner, its only stockholder, resolved to liquidate because of the failure to obtain sufficient business to justify continued investment.

Subsequent to the adoption of the liquidating resolution, the Corporation sold its office furniture and equipment to the Company for a price set by the Company's firm of accountants as the fair market value thereof. We have no issue as to gain or loss on this sale. The Corporation also transferred to the Company possession of, access to, and the right to make use of certain investment statistical and research material, if not title thereto, without consideration of any kind.

Pursuant to the liquidating resolution of the Corporation's board of directors, which also authorized distribution of the corporate assets, there were made to petitioner distributions on the dates, in the form, and of the fair market value, as follows:

May 27, 1952	Cash	$100,000.00
June 1, 1952	U. S. Treasury bonds	48,906.25
Sept. 18, 1952	Cash	65,244.74
	Total	$214,150.99

The Corporation's accumulated earnings and profits at the time of the above distributions were at least $212,150.99. The distributions were all attributable to the stated liquidating preference of $250,000 for 2,500 shares of preferred stock owned by petitioner, and no part was attributable to the common shares which he owned.

Upon completion of the distributions, petitioner delivered his preferred and common shares to the Corporation for cancellation. Thereafter, the Corporation filed a return of information with respondent, and the State of Delaware, on September 24, 1952, issued a certificate of dissolution.

Petitioner had held all of his stock in the Corporation for more than 6 months preceding the first distribution to him; his cost basis for the stock was $2,000.

In their income tax return filed for the year 1952, petitioners reported the gain of $212,150.99 from the liquidation of petitioner's shares in the Wellington Corporation as long-term capital gains. The Commissioner, in his deficiency notice, determined that the distribution to the extent of $212,150.99 was "essentially equivalent to the distribution of taxable dividends."

ISSUE II.

Fund Shares, Inc.

As a result of an examination of Shares' income tax returns for 1948 and 1949, Shares and the Company agreed to the allocation of Shares' income, deductions, credits, and allowances to the Company under section 45 for the period September 1, 1948 to April 30, 1950. The Company's returns for 1950 and 1951 reflected the inclusion of Shares' income and expenses in the returns filed by the Company. On these returns, the income, deductions, credits, and allowances of Shares were itemized separately from those of the Company, only the separately shown totals being consolidated and charged or credited to the Company.

Subsequent to the assumption by the independently owned Wellington Distributors, Inc., of the performance of the functions previously performed by Shares, and because Shares had no business prospects, its board of directors resolved on December 15, 1952, to liquidate Shares completely and authorized distribution of its assets to its stockholders, in the form, and of the fair market value, as follows:

Petitioner	Cash	$11,386.58
	1,400 shares of the Fund	28,980.00
	Sub-total	$40,366.58
Petitioner-wife	Cash	34,059.30
T. J. Meaney, Inc.	Cash	1,261.47
	Total	$75,687.35

The stockholders of Shares executed a written consent to the dissolution. Prior to December 31, 1952, the distributions to Shares' stockholders as authorized in the liquidating resolution were made; the stockholders surrendered their shares for cancellation; a return of information was filed with respondent; and on January 19, 1953, a certificate of dissolution was issued by the State of Delaware.

The petitioners had held all their stock in Shares for more than 6 months preceding the first distributions to them. Petitioner's cost basis for his stock was $9,600; petitioner-wife's cost basis for her stock was $8,100.

Petitioners reported their gain from the liquidation of the shares which they owned in Fund Shares, Inc., as long-term capital gains. The Commissioner, in his deficiency notice, determined that the distributions to petitioners to the extent of $56,425.88 were "essentially equivalent to the distribution of taxable dividends."

OPINION.

BLACK, *Judge:* There is no dispute between the parties as to the amounts of gain which petitioners received from the liquidation of their shares in Wellington Corporation and in Fund Shares, Inc. The dispute is as to how such gains should be treated for taxation.

ISSUE I.

Wellington Corporation.

The first issue presented is whether the distributions by the Corporation to petitioner in the amount of $214,150.99

were in liquidation of stock or had the effect of taxable dividends to the extent of petitioner's gain on the distribution. Petitioner contends that that portion of the payment in liquidation of his stock in the Corporation which is in excess of the cost basis of his stock is taxable as long-term capital gain under section 115(c).[8] Respondent contends that the excess is taxable as ordinary income under section 112(c)(2).[9] We agree with petitioner. It is clear from the record that the distributions by the Corporation to petitioner were in complete liquidation of the Corporation. They were made pursuant to a corporate resolution authorizing liquidation and directing distribution of corporate assets. The Corporation was in fact dissolved within 1 year of the distributions and the liquidation served the useful business purpose of dissolving a corporation with no business operations. Thus, literal compliance with section 115(c) has been established.

The respondent, however, asserts that the liquidation was but part of a reorganization, that the distribution had

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8. SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

* * *

(c) Distributions in Liquidation.—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. * * *

9. SEC. 112. RECOGNITION OF GAIN OR LOSS.

* * *

(c) Gain from Exchanges not Solely in Kind.

* * *

(2) If a distribution made in pursuance of a plan of reorganization is within the provisions of paragraph (1) of this subsection but has the effect of the distribution of a taxable dividend, then there shall be taxed as a dividend to each distributee such an amount of the gain recognized under paragraph (1) as is not in excess of his ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913. The remainder, if any, of the gain recognized under paragraph (1) shall be taxed as a gain from the exchange of property.

the effect of a taxable dividend, and that it must be taxed as ordinary income under subsection 112(c)(2). That portion of the statute requires that a distribution be taxed as a dividend rather than as capital gain if it (1) is in pursuance of a plan of reorganization, (2) has the effect of a taxable dividend, and (3) is within the provisions of subsection 112(c)(1).[10] If we assume, *arguendo*, that the first two conditions of subsection 112(c)(2) are met, we must still determine whether the distribution is within the provisions of subsection 112(c)(1). The distributions which are within the provisions of subsection 112(c)(1) are those distributions made (1) partly in exchanges solely in kind as set forth in subsection 112(b)(1), (2), (3), or (5);[11] and

---

10. (1) If an exchange would be within the provisions of subsection (b)(1), (2), (3), or (5), or within the provisions of subsection (1), of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph or by subsection (1) to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

11. Sec. 112. Recognition of Gain or Loss.

* * *

(b) Exchanges Solely in Kind.—

(1) Property held for productive use or investment.—No gain or loss shall be recognized if property held for productive use in trade or business or for investment (not including stock in trade or other property held primarily for sale, nor stocks, bonds, notes, choses in action, certificates of trust or beneficial interest, or other securities or evidences of indebtedness or interest) is exchanged solely for property of a like kind to be held either for productive use in trade or business or for investment.

(2) Stock for stock of same corporation.—No gain or loss shall be recognized if common stock in a corporation is exchanged solely for common stock in the same corporation, or if preferred stock in a corporation is exchanged solely for preferred stock in the same corporation.

(3) Stock for stock on reorganization.—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization,

(2) partly in money or other property. The record clearly shows that petitioner received a distribution of money or other property in the liquidation, but we are unable to find any exchange solely in kind as set forth in subsection 112 (b)(1), (2), (3), or (5). Petitioner received nothing other than $214,150.99 in cash and bonds of the United States upon the liquidation.

Respondent, on brief, has cited many cases for the proposition that we should "look through form to substance," or see the "net effect" of the transaction here involved. *Survaunt v. Commissioner*, 162 F. 2d 753 (C. A. 8, 1947); *Lewis v. Commissioner*, 176 F. 2d 646 (C. A. 1, 1949); *Love v. Commissioner*, 113 F. 2d 235 (C. A. 3, 1940); *Estate of Elise W. Hill*, 10 T. C. 1090 (1948); *Standard Realization Co.*, 10 T. C. 708 (1948); *Becher v. Commissioner*, 221 F. 2d 252 (C. A. 2, 1955); and *Liddon v. Commissioner*, 230 F. 2d 304 (C. A. 6, 1956), certiorari denied (1956) 352 U. S. 824. We do not think the cases cited and relied upon by respondent are applicable to the facts in the instant case. It is to be noted that in each cited case there was an exchange of like property plus a distribution of money or other property. The cited cases stand for the proposition that we may and should look carefully to determine the true nature of disputed transactions; they do not stand for the proposition that we may or can manufacture missing links or imagine the existence of operative facts which will either invoke or revoke the application of any statute.

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exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

* * *

(5) Transfer to corporation controlled by Transferor.—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange. * * *

It is undoubtedly true that "[t]he underlying purpose of the exemptions in § 112 is to disregard corporate manipulations which do not substantially affect the shareholders' interest in the properties," as the Second Circuit stated in *Helvering v. Schoellkopf*, 100 F. 2d 415, at 417, but it is equally true that Congress subjected to the provisions of subsection 112(c)(2) only those transactions encompassed within subsection 112(c)(1) and, by reference therein contained, possessing the nature of those transactions clearly and unambiguously set forth in subsection 112(b)(1), (2), (3), or (5). No matter how broadly or how piercingly we look, we can find no such transaction as is set forth in subsection 112(b)(1), (2), (3), or (5), whether with or without the "boot" to which subsection 112(c) addresses itself. "In the interpretation of statutes levying taxes it is the estab lished rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out." *Gould v. Gould*, 245 U. S. 151. We are entitled to consider that the use of the word "exchanges" was confined to its ordinary sense, and cannot extend it by implication or enlarge it by construction so as to embrace matters not specifically pointed out in subsection 112(b)(1), (2), (3), or (5). *Edward H. Ellis & Sons v. United States*, 187 F. 2d 698, 700; *Mead Corporation v. Commissioner*, 116 F. 2d 187, 192.

Here there were no exchanges solely in kind as enumerated in section 112(b)(1), (2), (3), or (5). The shares were surrendered for cancellation in complete liquidation and the only property received was money or other property. Section 112(c)(2) applies only where (c)(1) applies, and (c)(1) applies only where an exchange would be within one of the provisions expressly mentioned in (c)(1). None of the provisions mentioned in (c)(1) has even remote application. Section 112(c)(1) has no application, and section 112(c)(2) has no application. The situation comes precisely within section 115(c). The amount of the distribution in excess of

petitioner's cost basis is not subject to taxation as dividends but is taxable as capital gain. As to this issue we sustain petitioners.

ISSUE II.

FUND SHARES, INC.

The second issue here presented is whether payments made in redemption of petitioners' stock in Fund Shares, Inc., were payments in liquidation of stock under section 115(c) [12] and taxable as capital gains, or "essentially equivalent to the distribution of a taxable dividend" under section 115(g)(1) [13] and taxable as ordinary income.

Petitioners contend that the amounts they received were "distributed in complete liquidation of a corporation" and have established that the board of directors of Shares adopted a resolution authorizing the complete liquidation of the corporation and the distribution to petitioners in cancellation of their stock, that Shares was in fact completely liquidated and dissolved within 1 year after the distribution, and that the liquidation served the business purpose of dissolving a corporation with no business operations. Respondent does not contend that there was any reorganization of Shares as he contends there was of the Wellington Corporation. He contends, however, that the net assets of Shares belonged to the Wellington Company and that the distributions were but taxable dividends made by the Wellington

12. Relevant portions quoted *supra*, note 8.

13. SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

* * *

(g) Redemption of Stock.—

(1) In General.—If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock dividend) at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend.

Company out of accumulated earnings and profits. To support this contention respondent relies upon two facts: first, that Shares and the Company agreed with an agent of the internal revenue service to treat, for tax purposes, the income of Shares as income of the Company under section 45;[14] and second, that petitioners held 98.33 per cent of the stock of Shares and that petitioner-husband held 100 per cent of the stock in the Company. The respondent concludes from these two facts that Shares was but a sham, that its net assets were the property of the Wellington Company, and that the distributions were in reality a disguised dividend paid out of the Company's accumulated earnings and profits.

In so concluding, the respondent has exceeded the authority granted by section 45 and has broadened the scope and ignored the purpose of that statutory enactment as set forth in Regs. 118, section 39.45-1(b)(1).[15] The very fact

14. SEC. 45. ALLOCATION OF INCOME AND DEDUCTIONS.

In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Commissioner is authorized to distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses.

15. § 39.45-1. *Determination of the taxable net income of a controlled taxpayer*— * * *

* * *

(b) *Scope and purpose.* (1) The purpose of section 45 is to place a controlled taxpayer on a tax parity with an uncontrolled taxpayer, by determining, according to the standard of an uncontrolled taxpayer, the true net income from the property and business of a controlled taxpayer. The interests controlling a group of controlled taxpayers are assumed to have complete power to cause each controlled taxpayer so to conduct its affairs that its transactions and accounting records truly reflect the net income from the property and business of each of the controlled taxpayers. * * * The standard to be applied in every case is that of an uncontrolled taxpayer dealing at arm's length with another uncontrolled taxpayer.

of the statutory enactment establishes that disregard of corporate entities is an extraordinary legal technique. Acts performed by the respondent under color of authority granted by section 45 which in fact exceed that authority will not be sustained. *General Industries Corporation*, 35 B. T. A. 615; *Chelsea Products Inc.*, 16 T. C. 840, affd. 197 F. 2d 620 (C. A. 3); *T. V. D. Co.*, 27 T. C. 879. Section 45 authorizes the distribution, apportionment, or allocation of gross income deductions, credits, or allowances; it does not authorize the distribution, apportionment, or allocation of net assets, surplus, or accumulated earnings and profits either specifically or by necessary implication. The purpose of section 45 as set forth in Regs. 118, section 39.45-1(b) is the placing of "a controlled taxpayer on a tax parity with an uncontrolled taxpayer" within the scope of a determination of "the true net income from the property and business of a controlled taxpayer." Respondent's action herein neither accomplishes such a purpose nor falls within such scope. Respondent's contention that because the income of Shares was taxed as that of the Company, the net assets of Shares which represented accumulated net income belonged to the Wellington Company is a contention that cannot be sustained. We think respondent's contention is wholly without merit. We, therefore, sustain petitioners under Issue II.

Because there are other adjustments not contested,

Decision will be entered under Rule 50.

DECISION.

[Caption omitted.]

Pursuant to the Findings of Fact and Opinion of the Court filed October 13, 1959, the parties on January 5, 1960, having filed an agreed computation of the tax, now therefore it is

ORDERED and DECIDED: That there is a deficiency in income tax for the taxable year 1952 in the amount of $372.36.

ENTER: Jan. 11, 1960.

(Signed) EUGENE BLACK,
Judge.

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

[Caption omitted.]

Before KALODNER, STALEY and HASTIE, *Circuit Judges.*

OPINION OF THE COURT BELOW.

By STALEY, *Circuit Judge.*

This petition for review requires us to determine whether distributions made to a shareholder pursuant to a corporate liquidation are taxable as dividend income under subsection 112(c)(2) or as a long term capital gain under subsection 115(c) of the Internal Revenue Code of 1939, 26 U. S. C. A. (Int. Rev. Code 1939), which provisions control here.

For many years Wellington Fund, Inc. ("Fund"), a mutual fund, had separate contracts with Wellington Corporation ("transferor") for investment advisory services, and with W. L. Morgan & Company ("transferee") for the national promotion and distribution of the Fund's securities. These contracts constituted the principal if not exclusive business of the transferor and transferee. In 1952, the Fund terminated its contract with transferor and immediately thereafter entered into a contract with transferee for identical services.

Transferor was then liquidated, and the assets that it had utilized in performing the contract with the Fund were conveyed to the transferee. In addition, the following distributions were made to the taxpayer, transferor's sole stockholder:

May 27, 1952	Cash	$100,000.00
June 1, 1952	United States Treasury Bonds	48,906.25
Sept. 18, 1952	Cash	65,244.74
		$214,150.99

In his 1952 tax return, the taxpayer[1] reported $212,150.99 ($214,150.99 distribution less cost of his stock) as a long term capital gain under subsection 115(c).[2] The Commissioner, however, determined a deficiency on the ground that the distribution was taxable as dividend income under the related provisions of subsections 112(b)(3), (c)(1) and (2).[3] The Tax Court held that even assuming

1. References to taxpayer are to Walter L. Morgan only, since his wife, Helen Morgan, is a party only because she joined in the return.

2. "§ 115(c) Distributions in Liquidation.—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. * * *" 26 U. S. C. A. (Int. Rev. Code 1939) § 115(c).

3. "§ 112(b) Exchanges Solely in Kind—

* * *

"(3) Stock for stock on reorganization.—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization."

"§ 112(c)(1) If an exchange would be within the provisions of subsection (b)(1), (2), (3), or (5), * * * if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph or by subsection (*1*) to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property."

"§ 112(c)(2) If a distribution made in pursuance of a plan of reorganization is within the provisions of paragraph (1) of this sub-

all the other conditions had been met, the distribution could not qualify as dividend income because there had not been an actual exchange of stock between taxpayer and transferee.[4] The Commissioner here maintains that in substance and effect an exchange of stock was made since the taxpayer owned all the stock in both transferor and transferee.

In order to sustain the Commissioner, it must be shown that (1) there was a distribution of property or money ("boot") in addition to an exchange of stock all made in pursuance of a plan of reorganization, and (2) that such boot has the effect of a taxable dividend, i.e., it is not in excess of the taxpayer's share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913.[5]

We think that a chronological statement of the facts in the record, uncontradicted, largely stipulated and as found by the Tax Court, leads irresistibly to the conclusion that the distributions here were made in pursuance of a plan of reorganization.[6]

At all times relevant, taxpayer was president and board chairman as well as sole stockholder of both transferor and transferee, which were organized in 1929 and

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section but has the effect of the distribution of a taxable dividend, then there shall be taxed as a dividend to each distributee such an amount of the gain recognized under paragraph (1) as is not in excess of his ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913. The remainder, if any, of the gain recognized under paragraph (1) shall be taxed as a gain from the exchange of property." 26 U. S. C. A. (Int. Rev. Code 1939) § 112(b), (c)(1), (c)(2).

4. Walter L. Morgan, 33 T. C. 30.

5. The parties stipulated that the distributions did not exceed such earnings.

6. "The term reorganization means * * * (D) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its shareholders or both are in control of the corporation to which the assets are transferred * * *." 26 U. S. C. A. (Int. Rev. Code of 1939) § 112(g)(1)(D).

1931 respectively. Another board member was Joseph E. Welch, who was also a principal executive officer in transferor, transferee, and the Fund. The taxpayer was also president of the Fund and chairman of its board. The ten other members of the board consisted of four executive officers in the transferor and transferee, the father of taxpayer's wife who died in 1941, business associates with taxpayer in other enterprises, and two others with whom he had no apparent business relationship. Four out of five and five out of seven executive officers of transferor and transferee respectively served on the Fund's board.

For the fiscal year ended May 31, 1951, transferor reported an income of $305,175.96. However, no dividends were paid that year. During late 1951 and early 1952, an internal revenue agent on several occasions met with transferor's representatives and discussed the imposition of a surtax under section 102 of the Internal Revenue Code of 1939 for an allegedly improper accumulation of surplus. On February 11, 1952, a conference was held between the agent's group chief and transferor's representatives without any agreement being reached.

At the Fund's board meeting held on February 27, 1952, taxpayer raised the question of transferring the contract from transferor to transferee. It was the consensus of the board that the contract with transferor should be terminated and one calling for similar services be entered into with transferee which was to change its name to include the word "Wellington." Minutes of that meeting, signed by the Fund's secretary, who was a vice president in both transferor and transferee, contained the following:

> "* * * and it was the sense of the meeting that the present contract between the Fund and Wellington Corporation should not be renewed but that the activities of Wellington Corporation and W. L. Morgan & Co. should be combined into one company for greater efficiency and the Investment Advisory Contract be made with this company."

At that meeting, taxpayer also presented a form of proposed investment services contract with transferee, apparently identical in all essential respects with the contract then in effect between the Fund and transferor.

At a special meeting of transferor's board attended by taxpayer and Welch, held on March 3, 1952, to discuss termination of its contract with the Fund, taxpayer stated that when a new contract with transferee was approved by the Fund, all of transferor's employees would be placed on transferee's payroll.

In soliciting the Fund's shareholders for approval of the change, a proxy dated March 7, 1952, prepared under order of the Fund's board and distributed over the name of its secretary, who was a vice president in both transferor and transferee, contained the following:

> "Investment Advisory Agreement with The Wellington Company
>
> "For greater efficiency and corporate simplification and economy, the Directors of Wellington Corporation, the investment advisor for Wellington Fund, Inc., and the Directors of W. L. Morgan & Co., the sponsor and national distributor for the Fund, have resolved that their activities should be combined into one company to be called The Wellington Company. Under this arrangement, the general management, investment management and research services and distribution activities will be conducted in the future by separate departments of one corporation rather than by two corporations as heretofore. This arrangement involves no changes in investment or management policies or practices. The Executive Committee, Investment Committee and the entire statistical and research staff and all employees of the investment advisor will become associated with The Wellington Company with the same duties and responsibilities as heretofore. *The name of W. L. Morgan & Co. will be*

changed to The Wellington Company, and the present Wellington Corporation will be dissolved." (Emphasis supplied.)

The shareholders met on April 9, 1952, at 3:00 P. M. and approved the contract with transferee. At 4:00 P. M. on that same date, transferee's board at a special meeting resolved that transferee would assume the obligation transferor had toward its employees under a profit-sharing plan. The minutes of that meeting also indicate that transferee had already decided to change its name to include the word "Wellington."

On April 10, 1952, the contract with transferor was terminated and on April 12, 1952, one calling for similar services was entered into with transferee.

In the meantime, transferee took over the transferor's furniture and other equipment, research data, and all of transferor's employees together with the employees' profits sharing plan.

On May 27, 1952, after unsuccessfully attempting to secure new business, transferor's board, pursuant to taxpayer's written consent, resolve to liquidate.

Upon completion of the arrangements outlined above, the transferee had a new corporate division devoted to investment counselling. Without hiatus an intact capability to perform the contract with the Fund was transplanted from transferor to transferee. Taxpayer continued to be the sole stockholder of transferee. Also, the transferor, as taxpayer himself testified, could perform no investment advisory services without the use of transferee's personnel.

It is clear to us that these actions constituted the carrying out of a plan of reorganization under subsection 112(g)(1)(D).

The taxpayer contends there was no reorganization since the contract with the Fund, the transferor's most valuable asset, was not transferred. This, of course, is without merit. We need not articulate the obvious answer

which the facts compel, for the subsection involved requires only that a part of the assets be transferred. Becher v. Commissioner, 221 F. 2d 252 (C. A. 2, 1955); Lewis v. Commissioner, 176 F. 2d 646 (C. A. 1, 1949); 3 Mertens, Law of Federal Income Taxation, ¶ 20.91 (1957).

As we noted earlier, the Tax Court held that there must be an actual physical exchange of stock before the distribution here could be taxable as dividend income. With this conclusion we cannot agree, for it is contrary to the purposes that Congress meant to serve in enacting subsections 112(b) and (c)(2).

Subsection 112(c)(2) was enacted to reach and tax as ordinary income gain realized by a stockholder from a corporate reorganization to the extent that such gain constitutes undistributed earnings. It appeared as subsection 203(d)(2) of the Revenue Act of 1924, 26 U. S. C. A. (Rev. Act of 1924). The Senate Finance Committee Report [7] accompanying the 1924 Act and commenting on that subsection stated:

> "The committee approves certain amendments to the income tax law contained in the House bill to stop the methods of avoidance which are now being commonly availed of by taxpayers.
>
> "(1) The provisions of the reorganization section of the present law have been rewritten to prevent the use of the section to escape proper taxation * * * by distributing as capital gain what are in effect dividends out of earnings."

If the transferor's assets had been transferred to a newly formed corporation in exchange for stock, there is no question that the boot would have been taxable as dividend income. That an existing corporation in which the taxpayer was the sole shareholder was used instead of a newly formed one cannot alter the true nature of the

7. S. Rep. No. 398, 68th Cong., 1st Sess. p. 7 (1939-1 Cum. Bull. (Part 2) 266, 271).

transaction. Here, the issuance of new stock would have been a meaningless gesture since the stock the taxpayer already held represented the total value of all the assets except for the boot.

Liddon v. Commissioner, 230 F. 2d 304 (C. A. 6), cert. denied, 352 U. S. 824 (1956), which involve similar facts, fully supports our conclusion. There, the taxpayers, husband and wife, owned eighty per cent of the stock in a corporation engaged in selling and servicing automobiles under a franchise dealer contract with General Motors Corporation, while one Davis owned the other twenty per cent. Davis' offer to sell his stock to the taxpayers for book value was refused. Thereafter, taxpayers established a new corporation in which they owned all but one share of stock and secured a new franchise contract. The new corporation then agreed to a plan whereby it would purchase the old corporation's assets and accept an employee's retirement fund. Taxpayers invested an additional twenty thousand dollars in personal funds in the new corporation. Thereafter Davis' stock was purchased by the old corporation, which was then dissolved, and $150,000 in cash and notes distributed to the taxpayers, which the Commissioner contended, and the Tax Court agreed, should be taxed as ordinary income and not as capital gain. In affirming on this point, Judge Stewart, now Justice Stewart, approved and summarized the Tax Court's reasoning at 230 F. 2d 306-307:

> "Moreover, since at the beginning of the series of transactions the petitioner held stock in the old corporation, and at the end they held stock in the new corporation, plus 'money to boot,' the court reasoned that although there was not a direct exchange of stock in the old corporation for stock in the new, plus 'other property or money,' that was the net effect of what was done. Accordingly, the court concluded that the case was governed by sections 112(b)(3) and 112(c) of the 1939 Code."

Taxpayer cites Emma Cramer, 20 T. C. 679 (1953), and Trianon Hotel Co., 30 T. C. 156 (1958), which are in applicable since in neither of these cases did the court conclude that there was a reorganization as was the case both here and in *Liddon*.

The decision of the Tax Court will be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

HASTIE, *Circuit Judge, dissenting.*

The question here is whether the gain element in the sum of $214,150.99 received by the taxpayer in 1952 in exchange for his stock in Wellington Corp., upon total liquidation of that corporation, is taxable as long term capital gain under Section 115(c) of the Internal Revenue Code of 1939 or whether it may be taxed as ordinary income in the nature of a dividend received in the course of a reorganization under Section 112(c)(2).

This court now holds that the taxpayer's gain is taxable as ordinary income. In so doing it recognizes that the result it reaches can be achieved only by fitting the transactions in this case within the situation described in Section 112(b)(3) and (c)(1)—*i.e.*, where "stock or securities in a corporation a party to a reorganization are . . . exchanged . . . for stock or securities . . . in another corporation a party to the reorganization" and, in addition to stock thus received, the stockholder also receives "other property or money". In the words of the majority opinion, "it must be shown that (1) there was a distribution of property or money ('boot') in addition to an exchange of stock all made in pursuance of a plan of reorganization, and (2) that such boot has the effect of a taxable dividend . . . ." I agree that the plain language of the statute requires that there be an exchange of stock. *Trianon Hotel Co.*, 1958, 30 T. C. 156; *Emma Cramer*, 1953, 20 T. C. 679; 3 MERTENS, FEDERAL INCOME TAXATION, 1957, § 20.147.

Having thus stated what the statute requires, the court also recognizes that the series of transactions in this case involved no actual acquisition of stock by the taxpayer either through an ordinary exchange or, as in *Liddon v. Commissioner*, 6th Cir. 1956, 230 F. 2d 304, upon which the court relies, through the creation of a new corporation during a reorganization with the taxpayer as an original stockholder. It is argued, however, that in this case no transfer of stock of a corporation to the taxpayer is the legal equivalent of an actual stock transfer merely because the taxpayer already was and long had been sole stockholder of that corporation. I can see no logical basis for thus finding an exchange of stock within the statutory requirement without any demonstration that something happened in this case which was equivalent to a transfer of stock to the taxpayer.

There may be one situation in which it is properly arguable that the equivalent of a stock transfer has occurred pursuant to a reorganization though technically there was no transfer. Assume a case which is like the present one in that an individual owns all the stock of both a liquidating corporation and a second corporation which assumes the functions of the liquidating corporation, but with the additional fact that the worth of the second corporation is substantially increased in a reorganization by an intercorporate transfer of valuable assets of the liquidating corporation. The reorganization deprives the individual of his stock in the first corporation and in return enhances the value of his ownership of the transferee corporation. Such added worth of the second corporation might be the basis for the issuance of new certificates, but it would be pointless to issue new certificates to one who already is the sole stockholder. Therefore, for purposes of Section 112(c) it is arguable that such a case should be treated as one in which there has been an exchange of stock for stock without requiring the formality of a new stock issue.

But on the record here there was no substantial increase in the worth of the second corporation through any transfer of assets by the liquidating corporation. The only intercorporate transfers of assets in this case are described as follows in the unchallenged findings of the Tax Court:

> "Subsequent to the adoption of the liquidating resolution, the Corporation sold its office furniture and equipment to the Company for a price set by the Company's firm of accountants as the fair market value thereof. We have no issue as to gain or loss on this sale. The Corporation also transferred to the Company possession of, access to, and the right to make use of certain investment statistical and research material, if not title thereto, without consideration of any kind."

As a sale for fair value, the transfer of office furniture and equipment did not enrich the transferee corporation. While statistical and research data may have substantial utility, it is not claimed that in the circumstances of this case the transfer of data substantially increased the worth of the transferee corporation. Of course, the reemployment of employees of the liquidating company by the transferee company, which the majority emphasizes, is not a transfer of assets and does not increase corporate worth.

One other item deserves mention in this connection. It is the contract long held by the liquidating corporation to render investment advisory services to Wellington Fund, Inc. Its duration paralleled that of the present transferee corporation's separate contract with the Fund for promotional services. The Tax Court found that the Fund made a business decision to attempt to reduce its costs and gain other advantages by contracting with a single corporation for both advisory and promotional services. Accordingly, the Fund cancelled its contract with its longtime adviser and two days later entered into a similar contract with the

company which theretofore had done only promotional work for it.

This action of the Fund ruined the business of the original advisory corporation and caused its liquidation. It also conferred a very substantial economic advantage on the transferee corporation. But that is not enough to make the Fund's action significant for present purposes. Our concern is with property transfers between a liquidating corporation and a transferee corporation within and pursuant to a plan of reorganization. There was here no assignment of contract rights between such corporations. Nor is it found as a fact that they or their sole stockholder either could or did use the Fund as an instrumentality to do their bidding. True, their sole stockholder was also President and Chairman of the Board of the Fund. But the Tax Court found that he, his family and his close business associates owned only .003 percent of the stock of the Fund. It has already been pointed out that the Fund derived a business advantage of its own from shifting its contractual arrangement for advisory services. Moreover, under the Tax Court's findings, the decision to liquidate was not made until after the shifting of the Fund's contract and only after a search for other business to replace the cancelled contract had proved unsuccessful. It seems worthwhile to spell this matter out in some detail because in my view it involves the only doubtful point in this case, even though on this point I do not disagree with the majority opinion which apparently concedes that the conduct of the Fund in cancelling one contract and entering into another did not constitute a transfer of assets between the two service companies and was not a step in a reorganization.

In these circumstances, I do not see how it can be said in any meaningful way that there was in this case even a conceptual exchange of stock, and, of course, there was

not a real one.[1] Therefore, Section 112(c) is inapplicable and the decision of the Tax Court should be affirmed.

1. Although I can find no Section 112 exchange of stock here to prevent treatment of the present distribution as one made in liquidation under Section 115(c), I recognize that the taxpayer is accomplishing a type of "bail-out" of accumulated corporate earnings while the same business continues in another corporation under his ownership and control. If this discloses a "loophole" in the statutory taxing scheme which should be closed, resort should be to Congress for appropriate action. In this connection see the discussion of a proposed amendment to Section 356(a)(2)(B)(ii) in Revised Report on Corporate Distributions and Adjustments, transmitted to the House Committee on Ways and Means by the Advisory Group on Subchapter C, at 66-67 (1958).

APPENDIX D.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Caption omitted]

ON PETITION TO REVIEW A DECISION OF THE TAX COURT OF THE UNITED STATES.

Present: KALODNER, STALEY and HASTIE, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby reversed, and the cause remanded for further proceedings not inconsistent with the opinion of this Court.

Attest:

IDA O. CRESKOFF,
Clerk.

March 21, 1961

APPENDIX E.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Caption omitted]

SUR PETITION FOR REHEARING.

Present: KALODNER, STALEY and HASTIE, *Circuit Judges.*

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By THE COURT:

STALEY,
Circuit Judge.

DATED:
April 13, 1961

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No. 305

In the Supreme Court of the United States

OCTOBER TERM, 1951

WALTER L. [illegible], PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

[illegible]
Solicitor General,
[illegible]
Assistant Attorney General,
[illegible]
[illegible]
Department of Justice, Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 96

WALTER L. AND HELEN MORGAN, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (Pet. 23–39) is reported at 33 T.C. 30. The opinion of the Court of Appeals (Pet. 41–53) is reported at 288 F. 2d 676.

JURISDICTION

The judgment of the Court of Appeals was entered on March 21, 1961. (Pet. 54.) A petition for rehearing was denied on April 13, 1961. (Pet. 55.) The petition for a writ of certiorari was filed on May 17, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

All of the assets of a corporation of which taxpayer was the sole stockholder, except cash and Gov-

ernment bonds constituting accumulated earnings, were transferred to another corporation of which taxpayer was also the sole stockholder; the accumulated earnings were distributed to taxpayer; and the transferee corporation continued to carry on the business of the transferor corporation. The question is whether the distribution of the earnings to taxpayer was made pursuant to a plan of reorganization, had the effect of a taxable dividend, and was taxable as such under Section 112(c)(2) of the Internal Revenue Code of 1939 despite the fact that additional stock in the transferee corporation (all of whose stock taxpayer already owned) was not formally issued in exchange for the transferred assets.

STATUTE INVOLVED

The pertinent provisions of Sections 112 and 115 of the Internal Revenue Code of 1939 are set forth in Appendix, *infra*, pp. 12–16.

STATEMENT

The taxpayer[1] owned 100 percent of the outstanding stock and was president and chairman of the board of directors of the Wellington Corporation (the "Corporation") and of W. L. Morgan & Company (the "Company"). He was also the president and chairman of the board of directors of the Wellington Fund, Inc. (the "Fund"). The Fund is an open-end investment company conducting a balanced mutual fund. For about 20 years prior to April 12,

[1] Walter L. Morgan will be referred to as the sole taxpayer. His wife, Helen Morgan, is a party only because a joint return was filed.

1952, the Corporation had provided investment advisory service to the Fund, and the Company had served as the national sponsor or underwriter, promoter and distributor of the Fund's stock. (Pet. 24–25.)

The Corporation reported income of $305,175.96 for its fiscal year ended May 31, 1951. No dividends were paid during the fiscal year. During late 1951 and early 1952, an internal revenue agent examining the Corporation's return discussed the imposition of a surtax upon the accumulated earnings with several representatives of the Corporation. These discussions resulted in a preliminary formal conference on February 11, 1952, between representatives of the Corporation and the Government, but no agreement was reached. (Pet. 29.)

On February 27, 1952, the board of directors of the Fund approved an investment advisory contract with the Company and submitted the agreement for the approval of the stockholders of the Fund at their annual meeting on April 9, 1952. The agreement was approved by a majority of the stockholders and was entered into by the Fund and the Company on April 12, 1952. (Pet. 29.) From that date, the Company—which changed its name to the Wellington Company—not only has continued to serve the Fund as national sponsor or underwriter, promoter and distributor of stock, but has supplied to the Fund the investment advisory service formerly provided by the Corporation. (Pet. 24–25.)

The Corporation failed to obtain sufficient new business to replace its contract with the Fund; ac-

cordingly, on May 27, 1952, the board of directors of the Corporation, upon the written consent of the taxpayer, its sole stockholder, resolved to liquidate. Following the adoption of the liquidating resolution, the Corporation sold its office furniture and equipment to the Company for a price set by the Company's firm of accountants as its fair market value. The Corporation also transferred to the Company possession of, access to, and the right to make use of its investment, statistical, and research material, if not title thereto, without consideration of any kind. (Pet. 30.) The Company previously had taken over all of the employees of the Corporation, together with the employees' profit-sharing plan. (Pet. 46.)

Pursuant to the liquidating resolution of the Corporation's board of directors, the following distributions were made to the taxpayer:

May 27, 1952—Cash	$100,000.00
June 1, 1952—U.S. Treasury Bonds	48,906.25
September 18, 1952—Cash	65,244.74
Total	214,150.99

The Corporation's accumulated earnings and profits at the time of these distributions were at least $212,150.99. Upon completion of the distribution, the taxpayer delivered his preferred and common shares to the Corporation for cancellation, and, on September 24, 1952, the State of Delaware issued a certificate of dissolution. (Pet. 30–31.)

In their joint tax return for the calendar year 1952, taxpayer and his wife reported the gain of $212,150.99 from the distribution ($214,150.99, less cost of stock, $2,000) as a long-term capital gain, on

the theory that it was realized from a liquidation of the enterprise and was therefore taxable as capital gain under Section 115(c) of the Internal Revenue Code of 1939. The Commissioner determined a deficiency on the ground that the gain was taxable as a dividend under Section 112(c)(2). (Pet. 31.) The Tax Court sustained the taxpayer. (Pet. 32–37.) The Court of Appeals (Judge Hastie dissenting) reversed. (Pet. 41–53.)

ARGUMENT

The decision below is correct. There is no conflict, or any other occasion for further review.

1. Section 112(c)(2) of the 1939 Code, Appendix, *infra*, p. 13, requires a corporate distribution to a stockholder to be taxed as a dividend rather than as a capital gain if it (1) is in pursuance of a plan of reorganization, (2) has the effect of a taxable dividend, and (3) is within the provisions of Section 112(c)(1). The focal point in this litigation is whether Section 112(b)(3), the provision triggering the operation of Section 112(c)(1), requires a formal exchange of stock for stock.[2] Despite its find-

[2] Section 112(a) states the general rule that upon the sale or exchange of property the entire amount of the gain shall be recognized, subject to enumerated exceptions. Section 112(b)(3) constitutes one of the exceptions. It provides that no gain or loss shall be recognized if, pursuant to a plan of "reorganization," stock is "exchanged solely for stock" between corporations which are parties to the reorganization. Section 112(g)(1)(D) defines a "reorganization" as including a "transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its shareholders or both are in control of the corporation to

ing that taxpayer held a 100 per cent stockholder interest in both the transferor Corporation and the transferee Company, and its assumption that a reorganization existed under Section 112(g)(1)(D), the Tax Court reasoned that, since no new stock was formally issued by the Company to taxpayer, no exchange took place but only a liquidation distribution

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which the assets are transferred." Under Section 112(h) "control" means at least 80 per cent stock ownership.

Section 112(c)(1) provides that if an exchange would be within the non-recognition provisions of subsection (b)(3) were it not for the fact that the property received in exchange consists not only of stock, but also of other property or money ("boot"), then the gain shall be recognized in an amount not exceeding the "boot".

Section 112(c)(2) provides that if a distribution pursuant to a plan of reorganization is within the provisions of Section 112(c)(1) but "has the effect of the distribution of a taxable dividend", then there shall be taxed as a dividend to each distributee such an amount of the gain recognized under Section 112(c)(1) as is not in excess of his ratable share of the undistributed earnings of the corporation.

A "dividend" is broadly defined in Section 115(a) as any distribution by a corporation to its shareholders out of current or accumulated earnings. This definition is "infused" into Section 112(c)(2), and, accordingly, "a distribution, pursuant to a reorganization, of earnings and profits 'has the effect of a distribution of a taxable dividend' within Section 112(c)(2)." *Commissioner* v. *Estate of Bedford*, 325 U.S. 283, 292. See also *Bazley* v. *Commissioner*, 331 U.S. 737, 743.

Section 115(c) provides that amounts distributed in complete or partial liquidation of a corporation shall be treated as in full or partial payment in exchange for the stock, and Section 115(i) defines a partial liquidation. However, these provisions govern liquidation distributions "apart from reorganizations", and "do not apply to a situation arising within § 112." *Commissioner* v. *Estate of Bedford*, *supra*, p. 291. See also *Lewis* v. *Commissioner*, 176 F. 2d 646 (C.A. 1); *Love* v. *Commissioner*, 113 F. 2d 236 (C.A. 3).

of money. (Pet. 23–39.) The Court of Appeals, reversing the Tax Court, refused to permit the form of the transaction to obscure the essential nature of the arrangement. As noted by the appellate court, the so-called liquidation distribution to taxpayer unquestionably would have been taxable as a dividend under Section 112(c)(2) had the Corporation's non-cash assets been transferred to a newly-created corporation in exchange for the latter's stock, and the fact that an existing corporation of which taxpayer already was the sole stockholder was utilized for the same purpose and in the same way—thus obviating the need for a formal exchange of his Corporation stock for new Company stock—did not alter the practical effect of what was done. The taxpayer's 100 per cent stockholder interest in the successor corporation was precisely the same, in substance, whether or not additional shares were issued to him. The Court of Appeals accordingly correctly rejected the taxpayer's contention that the distribution of the Corporation's accumulated earnings was a liquidation distribution resulting in capital gain under Section 115(c), and held that it represented "boot" received in a non-taxable exchange under Section 112 (b)(3), pursuant to a reorganization under Section 112(g)(1)(D), taxable as a dividend under Section 112(c)(2). (Pet. 41–49.)

The court below did not, as taxpayer assumes throughout his petition, indulge in "judicial legislation" by dispensing with the "exchange" requirement of the statute. On the contrary, properly looking

through form to the substance and effect of the entire transaction, it concluded that there was an "exchange" within the meaning of the statute.[3]

2. Neither the result reached by the Court of Appeals nor its reasoning is in conflict with any other decision. On the contrary, there are at least two other courts which have held that Section 112(b)(3) applies where there is no actual or formal exchange of stock for stock, but a reorganization exists. *Liddon* v. *Commissioner,* 230 F. 2d 304 (C.A. 6), certiorari denied, 352 U.S. 824; *Heller* v. *Commissioner,* 147 F. 2d 376 (C.A. 9), certiorari denied, 325 U.S. 868. As pointed out by the Court of Appeals (Pet. 49), even the pair of Tax Court decisions upon which taxpayer relies (Pet. 10) are inapposite, since in neither of them did the court conclude that a reorganization existed. *Cramer* v. *Commissioner,* 20 T.C. 679; *Trianon Hotel*

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[3] In the words of the court below (Pet. 47–48):

> As we noted earlier, the Tax Court held that there must be an actual physical exchange of stock before the distribution here could be taxable as dividend income. With this conclusion we cannot agree, for it is contrary to the purposes that Congress meant to serve in enacting subsections 112(b) and (c)(2).
>
> * * * * *
>
> If the transferor's assets had been transferred to a newly formed corporation in exchange for stock, there is no question that the boot would have been taxable as dividend income. That an existing corporation in which the taxpayer was the sole shareholder was used instead of a newly formed one cannot alter the true nature of the transaction. Here, the issuance of new stock would have been a meaningless gesture since the stock the taxpayer already held represented the total value of all the assets except for the boot.

Co. v. *Commissioner,* 30 T.C. 156. The Court of Appeals adhered to the established principle that in applying the reorganization provisions of the taxing statute, the transaction must be viewed as a whole, from beginning to end, in order that tax significance may be given to its substance rather than its form. *Helvering v. Limestone Co.,* 315 U.S. 179. See also *Gregory* v. *Helvering,* 293 U.S. 465, and *Minnesota Tea Co.* v. *Helvering,* 302 U.S. 609. More importantly, the result reached by the Court of Appeals, preventing, as it does, the use of the reorganization section to escape taxation by distribution as capital gains of what are in effect dividends out of earnings, is in accord with the announced purpose of Congress when it originally enacted Section 112(c)(2) as Section 203(d)(2) of the Revenue Act of 1924, 43 Stat. 253. See S. Rep. No. 398, 68th Cong., 1st Sess., p. 7 (1939–1 Cum. Bull. (Part 2) 266, 271). Accordingly, there is no issue of general importance involved in this case requiring further review by this Court.

3. Taxpayer suggests that further review is justified because the appellate court's construction of Section 112(b)(3) conflicts with the opinions of some private practitioners and writers, particularly a group advising the House Ways and Means Committee in 1957 with respect to proposed changes in the 1954 Code. (Pet. 9–10.) Since even "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one" (*United States* v. *Price,* 361 U.S. 304, 313), the views of a group of lawyers submitted to—but not acted upon by—a committee of a

subsequent Congress certainly are not authoritative as to the intent of the earlier Congress.[4] Although taxpayer represents (Pet. 7, 10) that "tax authorities" assume that an actual formal exchange of stock is required, he acknowledges that a "conceptual exchange of stock" (Pet. 7) would satisfy the requirements of the statute.

4. There is no merit to taxpayer's contention that the case should be remanded to the Tax Court for purposes of making a finding as to the existence of a reorganization. (Pet. 14–16.) Although the Tax Court only assumed *arguendo* that there was a reorganization, it expressly found that part of the assets of the Corporation was transferred to the Company (Pet. 30) and that taxpayer owned 100 per cent of the stock in both (Pet. 25), and those facts alone are sufficient to establish a reorganization under Section 112(g)(1)(D). As the Court of Appeals stated, "a chronological statement of the facts in the record, uncontradicted, largely stipulated and as found by the Tax Court, leads irresistibly to the conclusion that the distributions here were made in pursuance of a plan of reorganization." (Pet. 43.)

Moreover, the legal theory on which taxpayer challenges the existence of a reorganization rests upon

[4] Moreover, there is no good reason to assume that the proposed revision as adopted would have changed, rather than clarified, existing law. Indeed, the very portion of the advisory report quoted by taxpayer (Pet. 9–10) states that the existing boot provisions "literally" do not cover a case like the present, but suggests that literal compliance should not be necessary. Concededly, under the proposed revision the decision below would be correct.

the mistaken notion that Section 112(g)(1)(D) is inapplicable where only some of the assets of a corporation are transferred to another. The Court below correctly pointed out that (Pet. 46–47) "the subsection involved requires only that a part of the assets be transferred." See *Becher* v. *Commissioner*, 221 F. 2d 252 (C.A. 2); *Lewis* v. *Commissioner*, 176 F. 2d 646 (C.A. 1); 3 Mertens, *Law of Federal Income Taxation* (1957), Sec. 20.91.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1961.

APPENDIX

Internal Revenue Code of 1939, as amended (26 U.S.C., 1952 ed.):

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges Solely in Kind.*—

* * * * *

(3) *Stock for stock on reorganization.*—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(4) *Same—Gain of corporation.*—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(5) *Transfer to corporation controlled by transferor.*—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange

by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

* * * * *

(c) *Gain From Exchanges Not Solely in Kind.*—

(1) If an exchange would be within the provisions of subsection (b)(1), (2), (3), or (5), or within the provisions of subsection (l), of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph or by subsection (l) to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

(2) If a distribution made in pursuance of a plan of reorganization is within the provisions of paragraph (1) of this subsection but has the effect of the distribution of a taxable dividend, then there shall be taxed as a dividend to each distributee such an amount of the gain recognized under paragraph (1) as is not in excess of his ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913. The remainder, if any, of the gain recognized under paragraph (1) shall be taxed as a gain from the exchange of property.

* * * * *

(g) *Definition of Reorganization.*—As used in this section (other than subsection (b)(10) and subsection (l)) and in section 113 (other than subsection (a)(22))—

(1) The term "reorganization" means (A) a statutory merger or consolidation, or (B)

the acquisition by one corporation, in exchange solely for all or a part of its voting stock, of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of another corporation, or (C) the acquisition by one corporation, in exchange solely for all or a part of its voting stock, of substantially all the properties of another corporation, but in determining whether the exchange is solely for voting stock the assumption by the acquiring corporation of a liability of the other, or the fact that property acquired is subject to a liability, shall be disregarded, or (D) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its shareholders or both are in control of the corporation to which the assets are transferred, or (E) a recapitalization, or (F) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of a reorganization resulting from the acquisition by one corporation of stock or properties of another.

(h) *Definition of Control.*—As used in this section the term "control" means the ownership of stock possessing at least 80 per centum of the total combined voting power of all classes of stock entitled to vote and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

* * * * *

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) *Definition of Dividend.*—The term "dividend" when used in this chapter * * * means any distribution made by a corporation to its

shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made.

* * * * *

(c) *Distributions in Liquidation.*—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. * * *

* * * * *

(g) *Redemption of Stock.*—

(1) *In general.*—If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock dividend) at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend.

* * * * *

(i) *Definition of Partial Liquidation.*—As used in this section the term "amounts distributed in partial liquidation" means a dis-

tribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock.

* * * * *

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IN THE

Supreme Court of the United States

October Term, 1961.

No. 96.

WALTER L. and HELEN MORGAN,
Petitioners.

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

MOTION FOR LEAVE TO FILE A PETITION FOR REHEARING AND PETITION FOR REHEARING.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1961.

No. 96.

WALTER L. AND HELEN MORGAN,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

MOTION FOR LEAVE TO FILE OUT OF TIME A PETITION FOR REHEARING.

Come now Walter L. and Helen Morgan, by their attorneys, and move this Honorable Court for leave to file out of time a Petition for Rehearing, annexed hereto, and as grounds therefor assign the following:

1. On October 9, 1961, this Court entered an order denying Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit reversing a decision of the Tax Court of the United States. *Walter L. and Helen Morgan v. Commissioner of Internal Revenue* (October Term, 1960, No. 974).

2. Subsequent to the denial by this Court of Petition for Writ of Certiorari, and subsequent to the last day prescribed by Rule 58(2) of this Court to file a Petition for Rehearing, this Court, on November 15-16, 1961, heard argument in the case of *Turnbow v. Commissioner of Internal Revenue* (October Term, 1961, No. 60) and, on December 18, 1961, entered its decision in the *Turnbow* case, — U. S. —, 82 S. Ct. 353.

3. The decision of the Court of Appeals for the Third Circuit to whom this Court denied a Writ of Certiorari is in direct conflict with the decision of this Court in *Turnbow*. The principal question in this case (*Morgan*) is whether the Court of Appeals for the Third Circuit erred in holding that, even without any demonstrable "exchange" of like-kind property, Section 112(c)(2) of the Internal Revenue Code of 1939 is nevertheless applicable if the given business objective of the reorganization can be accomplished with or without an exchange. The decision of this Court in the *Turnbow* case explicitly states that an *actual* exchange is required in order that Section 112(c)(2) be applicable to a reorganization. The Tax Court of the United States so held in this case (*Morgan*) but was reversed by the Court of Appeals for the Third Circuit. The view of the Court of Appeals for the Third Circuit and that of this Honorable Court are irreconcilable.

4. The argument was heard and the decision entered in the *Turnbow* case after the time for filing Petition for Rehearing in this case prescribed by Rule 58(2) of this Court had expired. Diligent effort has been made subsequent to the *Turnbow* decision to file this motion and Petition for Rehearing.

5. Although Rule 58 of this Court requires petitions for rehearing to be filed within 25 days of an order on petition for writ of certiorari, this Court has held that any finality of litigation as expressed under Rule 58, under which petitions for rehearing that are out of time will not be received, must yield where the interests of justice would make unfair the strict application of that rule. *United States v. Ohio Power Co.*, 353 U. S. 98 (1957) reh. den. 353 U. S. 977 (1957). This is particularly true where, as here, the petition is based on "grounds which are confined to intervening circumstances of substantial or controlling effect" (Rule 58(2)).

WHEREFORE, petitioners move this Honorable Court for leave to file Petition for Rehearing, annexed hereto, notwithstanding the expiration of the prescribed period for such filing.

WILLIAM R. SPOFFORD,

ANDREW B. YOUNG,
Counsel for Petitioners.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1961.

No. 96.

WALTER L. AND HELEN MORGAN,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners, on the grounds following, petition for rehearing of the order of this Court denying petitioners' Petition for Writ of Certiorari:

1. The decision of the Court of Appeals is in direct conflict with the decision of this Court in *Turnbow v. Commissioner of Internal Revenue.* As stated in the Petition for Certiorari, the principal question in this case is as follows:

> "1. Section 112(c)(2) of the Internal Revenue Code of 1939 by explicit statutory provision is made applicable only to corporate reorganization transactions involving 'exchanges' of so-called 'like-kind' property. Assuming *arguendo* a corporate reorgani-

zation, the question presented is whether the Court of Appeals for the Third Circuit erred in holding that *even without any demonstrable* 'exchange' of like-kind property Section 112(c)(2) is nevertheless applicable if the given business objective of the reorganization can be accomplished with or without an exchange."

The Court of Appeals for the Third Circuit held that Section 112(c)(1) and (2) of the Internal Revenue Code of 1939 should apply in this case even though there was no *actual* "exchange" of so-called "like-kind" property. As stated in the majority opinion of Judge Staley (Pet. for Writ of Cert. p. 47):

> "As we noted earlier, the Tax Court held that there must be an actual physical exchange of stock before the distribution here could be taxable as dividend income. With this conclusion we cannot agree, for it is contrary to the purposes that Congress meant to serve in enacting subsections 112(b) and (c)(2)."

In his dissenting opinion, Judge Hastie stated (Pet. for Writ of Cert. pp. 50, 52-53):

> ". . . It is argued, however, that in this case no transfer of stock of a corporation to the taxpayer is the legal equivalent of an actual stock transfer merely because the taxpayer already was and long had been sole stockholder of that corporation. I can see no logical basis for thus finding an exchange of stock within the statutory requirement without any demonstration that something happened in this case which was equivalent to a transfer of stock to the taxpayer."
>
> • • •
>
> "In these circumstances, I do not see how it can be said in any meaningful way that there was in this case even a conceptual exchange of stock, and, of course, there was not a real one. Therefore, Section

112(c) is inapplicable and the decision of the Tax Court should be affirmed."

In the case of *Turnbow v. Commissioner of Internal Revenue*, — U. S. —, 82 S. Ct. 353, 357 (1961), this Court, speaking through Mr. Justice Whittaker, stated:

> "We are also agreed that § 112(c)(1) can apply only if the exchange actually consists *both* of 'property permitted by [subsection (b)(1), (2), (3), or (5), or subsection (1) of § 112] . . . to be received without the recognition of gain' *and* 'other property or money.' And we think it is clear that the 'property permitted by [§ 112(b)(3)] . . . to be received without the recognition of gain' is 'stock or securities in . . . a party to a reorganization,' 'in pursuance of [a] plan of reorganization,' and 'for stock . . . in such corporation or in another corporation [which is] a party to the reorganization.' Since, as is admitted, none of the property involved in this exchange actually met that description, none of it was 'property permitted by [§ 112(b)(3)] . . . to be received without the recognition of gain,' and therefore § 112(c)(1) does not apply to postpone recognition of petitioner's gain from the Foremost stock.
>
> This, of course, is not to say that § 112(c)(1) is without purpose or function. It is to say only that it does not apply unless some part, at least, of the property exchanged *actually* meets the particular description contained in the applicable section or subsection of the Code."

It is submitted that the decision of the Court of Appeals in the instant case holding that no *actual* exchange of "like-kind" property is required in order to come within Section 112(c), is in conflict with the statement of this court above quoted from the *Turnbow* decision, particularly where Mr. Justice Whittaker saw fit to italicize the

words "both" and "and" in the first sentence above-quoted and use the word "actually" three times.

WHEREFORE, it is respectfully requested that this petition for rehearing be granted, the petition for writ of certiorari granted, the decision of the Court of Appeals for the Third Circuit reversed, and the decision of the Tax Court of the United States affirmed. Alternatively, it is requested that this petition for rehearing be granted and that the petition for writ of certiorari be granted and the case listed for argument.

Respectfully submitted,

WILLIAM R. SPOFFORD,

ANDREW B. YOUNG,
Counsel for Petitioners.

Certificate.

The foregoing petition for rehearing is believed to be meritorious and is presented in good faith and not for delay and that the petition is restricted to the grounds above specified.

WILLIAM R. SPOFFORD,

ANDREW B. YOUNG,
Counsel for Petitioners.